**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF OKLAHOMA**

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| (1) **ROBERT H. CARTER, DDS**, an Arkansas Resident, in his capacity as Trustee of the Robert H. Carter, DDS, PA, Defined Benefit Plan; and<br>(2) **ROBERT H. CARTER, DDS, PA, DEFINED BENEFIT PLAN**,<br><br>Plaintiffs,<br><br>v.<br><br>(1) **WILSHIRE-PENNINGTON GROUP, INC.**, an Oklahoma For Profit Business Corporation;<br>(2) **BENJAMIN D. KENNEDY, III**, individually and as an Officer, Employee and Investment Advisor Representative of Wilshire-Pennington Group, Inc.; and<br>(3) **BENJAMIN D. KENNEDY, IV**, individually and as an Officer, Employee and Investment Advisor Representative of Wilshire-Pennington Group, Inc.,<br><br>Defendants. | Case No. CIV-17-946-HE |

**COMPLAINT**

Plaintiffs, Robert H. Carter DDS, PA, Defined Benefit Plan ("DBP") and Robert H. Carter, DDS as Trustee of the DBP ("Carter"), for their Complaint against the above-named defendants, Wilshire-Pennington Group, Inc. ("WPG"), Benjamin D. Kennedy, III ("Danny Kennedy III") and Benjamin D. Kennedy, IV ("Danny Kennedy IV") (collectively the "Defendants"), allege and state as follows:

**THE PARTIES**

1. Plaintiff Carter is a resident and citizen of Arkansas, owner/employee of

Robert H. Carter, DDS, PA, and both a Beneficiary and a Trustee of the DBP.

2. Plaintiff DBP was organized in Arkansas in 2003 in compliance with the Employee Retirement Income Security Act of 1974 ("ERISA"), the Internal Revenue Code of 1986, (the "Code"), the Uruguay Round Agreements Act ("GATT"), the Uniform Services Employment and Reemployment Rights Act ("USERRA"), the Small Business Job Protection Act of 1996 ("SBJPA"), the Taxpayer Relief Act of 1977 ("TRA'97"), and the Economic Growth Act and Tax Relief Reconciliation Act of 2001 ("EGTRRA").

3. Defendant WPG is an Oklahoma For-Profit Business Corporation and Registered Investment Advisor based in Oklahoma City, Oklahoma, that served the DBP as its Investment Manager and ERISA Fiduciary from 2004 until Carter terminated its services for the DBP in February 2016.

4. Defendant Danny Kennedy III is an Oklahoma resident and citizen, a registered Investment Advisor, an Investment Advisor Representative for WPG, owner / officer of WPG, and co- Fiduciary for the DBP from 2004 until Carter terminated WPG's services for the DBP in February 2016.

5. Defendant Danny Kennedy IV is an Oklahoma resident and citizen, a registered Investment Advisor, an Investment Advisor Representative for WPG, and co-Fiduciary for the DBP from mid-2014 until Carter terminated WPG's services for the DBP in February 2016.

## JURISDICTION AND VENUE

6. Plaintiffs are empowered to file this Complaint pursuant to 29 U.S.C. § 1132(a)(2). This Court also has jurisdiction over the parties pursuant to 28 U.S.C. § 1332 because complete diversity between the Plaintiffs and Defendants exists as a result of the fact that they are citizens of different states and the amount in controversy exceeds $75,000. In addition, this Court has personal jurisdiction over Defendants.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the Plaintiffs' claims occurred in this judicial district, and a substantial part of the property that is the subject of the action was managed and administered in this judicial district.

8. Plaintiffs' Complaint is properly filed in this judicial district pursuant to ERISA § 502(a)(2) and 29 USC § 1132(a)(2) because this judicial district is where the DBP investments were administered, where the breaches of fiduciary duty took place, where Defendants committed or failed to commit the actions that their fiduciary duties required, and where Defendants reside or may be found.

## FACTUAL BACKGROUND

9. Plaintiffs incorporate the allegations contained in Paragraphs 1 through 8 above as if fully restated herein, and further state and allege as follows:

10. Carter is a 66 year old practicing Dentist and both a beneficiary and a Trustee of the DBP. He established the DBP under ERISA in 2003 for the benefit of himself and other employees of his Dental Practice.

11. In or around 2003 Danny Kennedy III was professionally associated with Xelan Investments through Wilshire Pennington Group (WPG's predecessor firm) as a Registered Representative and Investment Adviser Representative.

12. Danny Kennedy III began his professional Investment Advisory relationship with Plaintiffs in 2003.

13. Later in 2003, Danny Kennedy III organized WPG and registered it as an Investment Advisor with the Securities and Exchange Commission and/or the Oklahoma Department of Securities.

14. In 2004 Carter officially changed the DBP's Registered Investment Advisor from Xelan, Inc. to WPG and signed WPG's Investment Management Agreement with WPG in his role as Trustee of the DBP.

15. The Investment Management Agreement appointed WPG and Danny Kennedy III as the DBP's Investment Manager with authority to manage the investment of DBP assets.

16. The Investment Management Agreement also provides that WPG agrees to supervise and direct the investment of the DBP accounts in accordance with the investment objectives of the DBP as communicated by the DBP and Carter to the Investment Manager (WPG and Danny Kennedy III).

17. By accepting the DBP's appointment in the Investment Management Agreement, WPG, Danny Kennedy III, and, later on, Danny Kennedy IV became DBP fiduciaries under ERISA.

18. WPG, Danny Kennedy III and Danny Kennedy IV owed fiduciary duties to the DBP, such as loyalty, documentation, prudent investing, disclosure and diversification of investments to minimize the risk of large losses.

19. As fiduciaries under ERISA, WPG, Danny Kennedy III and Danny Kennedy IV are personally liable for any breach of their respective fiduciary duties as set forth in, without limitation, 29 U.S.C §1109 and 29 U.S.C. §1132(a)(2).

20. In or around mid-2012, Carter expressed concern to Danny Kennedy III that although the DBP had received over $600,000 in contributions for investment since 2003, the value of DBP account assets did not seem to be growing and its value was less than the total of amounts contributed to it for investment since the DBP was organized.

21. In response, Danny Kennedy III suggested consideration of other investment strategies. Carter did not agree to change the DBP's preferred types of investments or associated risk tolerance.

22. Later in 2012, WPG sent Carter a one page Memorandum styled "Additional Disclosure-Optional Managed Discretionary Contract" dated September 24, 2012. The memorandum briefly discussed the use of "Inverse and Leveraged ETFs" and included a one-page consent form.

23. When describing inverse and leveraged ETF investments, the Memorandum stated

> Because of the potential for these investment vehicles to perform well in bear markets, I would like to add leveraged and inverse ETFs to my investment strategy. However, these ETFs are intended to be very short term investments and pose unique risks. Therefore, please sign and return the attached

> Leveraged/Inverse Disclosure form if you would like us to add this strategy to your portfolio's available investment options.

24. Though lacking understanding of the information and Memorandum, Carter placed his trust and confidence in WPG and Danny Kennedy III and believed they would not have proposed this option if it was not both proper and also in the best interests of the DBP.

25. Carter signed and returned the one page document attached to the Memorandum which was then countersigned by Danny Kennedy III for WPG on October 12, 2012.

26. WPG and Danny Kennedy III did not inform Carter that investments in inverse/leveraged ETFs and ETNs involve a high degree of risk that would substantially elevate the DBP's investment risk and materially change the DBP's preferred types of investments.

27. No additional information, other than the Memorandum, was provided to Carter or the DBP about the "unique risks" of inverse/leveraged ETFs, the "trading platform", the "investment options", the "bear market" or other subject matter mentioned in the Memorandum by WPG or Danny Kennedy III.

28. Danny Kennedy III consistently assured Carter the DBP was in good hands, the DBP retirement assets were safe, and the DBP would achieve its retirement goals.

29. In or around August 2014, Carter again expressed his concern to Danny Kennedy III that DBP account assets were not growing sufficiently to fund its beneficiaries' anticipated retirement expectations as had been planned.

30. Carter, as Trustee of the DBP, told Danny Kennedy III that he preferred WPG to make more conservative investments for the DBP, restating the investment objectives of the DBP to materially decrease the risk of investment losses going forward.

31. Following the August 2014 meeting, Carter's communications directed to WPG were handled by Danny Kennedy IV, a registered investment advisor added in mid-2014 to WPG, or WPG staff members rather than Danny Kennedy III.

32. During the first half of 2015, Carter remained concerned about the adequacy of DBP retirement assets to provide the planned and expected level of retirement benefits for himself and his employees. Accordingly, calls were made to WPG for DBP account information and answers to Carter questions.

33. Danny Kennedy IV responded, expressing there was nothing to worry about and even suggesting the DBP account may substantially increase in value through investments in "vix" securities, which were unknown to Carter.

34. In mid-October 2015 an inquiry was made as to whether DBP had invested in "vix" securities and if so, how they had performed. Danny Kennedy IV responded that the "vix" investment opportunity had been "missed."

35. Unbeknownst to Carter at the time, Danny Kennedy IV had in fact failed to disclose DBP's associated large investments and large losses in such "vix" securities.

36. On February 4, 2016, Danny Kennedy IV wrote to the Carters to provide various DBP account information and, among other things, informed the Carters that the DBP account was "currently in the Moderate range". Defendants had not previously

informed Carter that the DBP account was not in the "Moderate range" as Carter had believed.

37. Shortly thereafter, Carter discovered the DBP account assets had lost in excess of $300,000 in value since August 2015 (including a loss of approximately one-half of the $80,000 contributed to the DBP for investment in January 2016).

38. The $300,000 loss was so substantial and concerning, Carter initially believed funds must have been misappropriated from the DBP account. Carter immediately terminated WPG's access to the DBP account.

39. From 2003 through the date of terminating WPG's services, Carter's Dental Practice contributed over $990,000 to the DBP for prudent and diversified investment by Defendants.

40. At the time Carter terminated the DBP relationship with WPG in February 2016, the total value of the DBP account was approximately $560,000, which included a cash component of approximately $333,000.

41. It was not until Plaintiffs interviewed a new Investment Manager for the DBP in March 2016 that Carter first learned Defendants had routinely made imprudent and inappropriate investments for the DBP since late 2012 in violation of their fiduciary duties of honesty, prudent investing, disclosure and diversification of investments to avoid large losses.

42. Unbeknownst to Carter, from late 2012 forward, WPG had unilaterally and materially changed the initial investment strategy for the DBP account and took increasingly greater investment risks in pursuit of higher returns including, without

limitation, employing the Leveraged/Inverse ETF strategy of investing in non-traditional ETFs and ETNs.

43. WPG's undisclosed, unexplained, and revised investment strategy favoring high-risk / high-reward short-term investments was fraudulent, imprudent, and contrary to the investment and risk tolerance preferences stated by Carter as Trustee of the DBP.

44. Defendants' imprudent and unauthorized gambling and speculation with DBP account assets resulted not only in huge investment losses when the stock markets were doing well, but it also prevented the DBP account from appreciating in value through prudent, conservative – moderate risk investing for retirement.

45. As a consequence of the foregoing, during the period of January 2013 through January 2016, the DBP account had a negative 30.77% return while, for example, the DJIA was up 26% and the S&P 500 was up 36%.

## CAUSES OF ACTION

### COUNT 1
**(BREACH OF ERISA FIDUCIARY DUTIES AND FRAUD)**

46. Plaintiffs incorporate the allegations contained in Paragraphs 1 through 45 as if fully set forth herein and further allege and state as follows:

47. Defendants are persons who, for compensation, engage in the business of advising others as to investing in, purchasing, and selling securities.

48. Defendants acted as agents and fiduciaries for Plaintiffs under both federal and state law during all times relevant to this action.

49. During the term of the Investment Management Agreement between Plaintiffs and Defendants, WPG and Danny Kennedy III were ERISA Sec. 3(38) fiduciaries of the DBP with Investment Authority in accordance with the investment objectives of the DBP as communicated by Plaintiffs to the Defendants.

50. Danny Kennedy IV became an ERISA Sec. 3(38) co-fiduciary of the DBP from the time he became an Investment Advisor Representative of WPG in 2014 and participated in the investment management of DBP assets and communications with the Plaintiffs about WPG management of the DBP investment account.

51. Defendants contractually agreed to supervise and prudently direct the investment of DBP assets in accordance with the investment objectives of the DBP that it communicated to Defendants.

52. From late 2012 through January 2016, as set forth above, Defendants breached their respective contractual and fiduciary duties to Plaintiffs, including duties of prudence, loyalty, diversification, disclosure and honesty.

53. As fiduciaries under ERISA Sec. 401(a), Defendants had a duty to Plaintiffs to manage and administer DBP investments solely in the interest of the DBP's participants and beneficiaries with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.

54. ERISA Sec. 401(a) obligates a fiduciary to diversify "the investments of the plan so as to minimize the risk of large losses."

55. From late 2012 through January 2016, as set forth above, Defendants failed to operate as required by ERISA Sec. 401(a).

56. From late 2012 through January 2016, as set forth above, Defendants fraudulently and intentionally concealed information from Plaintiffs.

57. ERISA Section 409(a), 29 U.S.C § 1109(a), "Liability for Breach of Fiduciary Duty", provides in pertinent part, that "any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through the use of assets of the plan by the fiduciary, and shall be subject to other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary."

58. As a direct and proximate result of the breaches of fiduciary duties and fraud alleged herein, the DBP investment assets suffered substantial losses.

59. Had Defendants invested in assets in accordance with the investment objectives of the DBP as communicated by Plaintiffs, the DBP's losses would have been avoided, just as investment losses in excess of $300,000 from August 2015 through January 2016 would have been avoided.

60. Defendants are liable to restore (a) investment losses to the DBP caused by each of Defendants' breaches of their respective fiduciary duties and associated concealment thereof, which are in excess of $75,000, and (b) an amount to the DBP representing a reasonable return from appropriate low risk investments that could have

been made for the DBP had Defendants not breached their fiduciary duties to Plaintiffs through imprudent investing and illicit practices., which is believed to be in excess of $75,000.

61. Defendants are also liable to Plaintiffs for such other equitable and remedial relief, including attorney fees and costs, as this Court may deem to be appropriate.

## COUNT 2
### (BREACH OF FIDUCIARY DUTIES UNDER INVESTMENT ADVISORS ACT OF 1940 AND COMMON LAW)

62. Plaintiffs incorporate the allegations contained in Paragraphs 1 through 61 as if fully set forth herein and further state and alleged as follows:

63. The Investment Advisors Act of 1940, 15 USC §§80b-1 through 80b-21, and the rules thereunder, impose a fiduciary duty on investment advisors by operation of law.

64. The Securities and Exchange Commission has also articulated specific obligations that arise from an investment advisor's fiduciary obligations.

65. Plaintiffs placed their trust and confidence in Defendants, and Defendants owed Plaintiffs fiduciary duties under common law including, without limitation, a duty to disclose to Plaintiffs all facts material to Defendants' management of the DBP's investment account, and Defendants fraudulently failed to do so.

66. By virtue of the conduct and omissions alleged herein, Defendants breached their respective fiduciary duties to the Plaintiffs under the Investment Advisors Act of 1940 and Common Law.

67. As a direct and proximate result of such unlawful conduct, omissions, and breach of fiduciary duty, the DBP has suffered money damages in excess of $75,000.00

based on the injury to its property, loss of future income and other general and specific damages to be proven at trial, together with attorney fees, costs and punitive damages.

## COUNT 3
### (BREACH OF CONTRACT AND PROFESSIONAL NEGLIGENCE)

68. Plaintiffs incorporate the allegations contained in Paragraphs 1 through 67 above as if fully restated herein and further state and allege as follows:

69. Plaintiffs entered into an Investment Management Agreement governing their relationship with Defendants to manage the investment of the DBP account in accordance with the investment objectives of Plaintiffs as communicated to Defendants.

70. Plaintiffs advised Defendants as Investment Managers of the investment objectives and risk tolerance of the DBP account.

71. Defendants represented to Plaintiffs that they were skilled and experienced as Investment Advisors and would prudently manage the ERISA DBP account in accordance with best professional practices and the law.

72. Plaintiffs paid Defendants the fees charged and otherwise fulfilled their responsibilities for the ERISA DBP in accordance with the terms of the Investment Management Agreement.

73. Defendants were required to perform under the Investment Management Agreement in good faith and in accordance with professional standards and applicable regulations.

74. Plaintiffs reasonably relied upon Defendants to use the degree of care, knowledge and skill required of professional Investment Advisors.

75. Defendants breached the Investment Management Agreement and failed to satisfy their professional standards and obligations by virtue of the conduct and omissions alleged herein.

76. Plaintiffs were damaged by Defendants' breach of contract and negligence in an amount in excess of $75,000, together with attorney fees and costs.

## COUNT 4
**(BREACH OF OKLAHOMA UNIFORM FRAUDULENT TRANSFER ACT)**

77. Plaintiffs incorporate the allegations contained in Paragraphs 1 through 76 above as if fully restated herein and further state and allege as follows:

78. On information and belief, some or all of the Defendants made transfers of property with actual intent to hinder, delay, or defraud Plaintiffs with respect to the liability some or all Defendants have to Plaintiffs as set forth herein, and /or to hinder, delay or defraud other creditors, without receiving equivalent value in exchange for the transfer and / or while some or all of the Defendants were insolvent.

79. Pursuant to the Oklahoma Uniform Fraudulent Transfer Act, 24 O.S. § 122, et. seq., Plaintiffs are entitled to avoidance of some or all of said Defendants' transfers. Said Defendants are therefore liable to Plaintiffs in the minimum amount of the transfers adjudged to be illicit, as alleged herein, according to proof.

## PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for the following relief:

a. That this Court order Defendants to restore to the DBP its losses – in an amount to be proven at trial – incurred as a result of Defendants' breach of fiduciary duties and other legal obligations to Plaintiffs;

b. That this Court enter such equitable and/or remedial relief against Defendants as necessary and appropriate, including restoring all losses to the DBP as a result of Defendants' breach of fiduciary duties and other obligations to the Plaintiffs;

c. That this Court order Defendants to restore to Plaintiffs their respective losses – in an amount to be proven at trial – as a result of Defendants' breaches of their respective obligations under the Investment Management Agreement, Federal law, Oklahoma law, and Common law as alleged herein;

d. That in the event that Defendants lack the assets necessary to satisfy a monetary award, this Court order the assets and income of each Defendant be garnished to the extent necessary to make Plaintiffs whole;

e. That this Court order any further relief which the Court deems to be just, appropriate and equitable, including taxable costs and interest, as provided by law;

f. That this Court order Defendants to pay Plaintiffs' reasonable attorney's fees and costs incurred as a result of initiating and prosecuting this action in accordance with ERISA Section 502(g)(1); and

g. That this Court enter judgment against Defendants, jointly and severally, for the damages and other relief alleged herein, as well as such other and further relief to which Plaintiffs may prove themselves to be justly entitled.

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By: /s/ D. Michael O'Neil

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